

³ Appellant timely requested oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated July 27, 2017, the Board denied the request for oral argument as the issue on appeal could be fully addressed on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0795 (issued July 27, 2017).

ISSUE

The issue is whether appellant has established permanent impairment of his lower extremities warranting a schedule award.

On appeal, counsel alleges that errors were made in the evaluation of the medical evidence. He contends that OWCP erred in not providing the referral physicians the definitions of causation, contribution, and acceleration as defined by OWCP's procedures. Counsel also contends that the opinions of OWCP's medical adviser, the second opinion physician, and the impartial medical examiner must be rejected because they are contrary to medical principles and Board precedent. Last, he also contends that due process was contravened because appellant's claim was denied while other federal workers had their claims accepted in nearly identical circumstances.

FACTUAL HISTORY

On April 2, 2013 appellant, then a 60-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he suffered permanent acceleration of his osteoarthritis of his bilateral hips and right plantar fasciitis as a result of his federal duties.⁴ He did not stop work.

In an accompanying statement, appellant noted that he began having pain in both of his hips seven years prior. He noted that he delivered mail on both residential and commercial routes, and that 90 percent of his routes were walking and 10 percent of his route involved relay truck delivery. Appellant indicated that he spent approximately five hours a day walking and the remaining three hours casing, arranging, and sorting mail. He noted that his duties involved lifting, carrying, sitting, standing, walking, climbing, bending, stooping, twisting, pushing, pulling, and driving a postal truck. Appellant noted that he performed these duties for 32 years.

In support of his claim appellant submitted a March 22, 2013 report wherein Dr. David C. Morley, Jr., a Board-certified orthopedic surgeon, noted that he examined appellant and reviewed his medical records and job duties. Dr. Morley diagnosed bilateral advanced hip arthritis, lumbosacral multiple level degenerative disc disease, degenerative joint disease, and right plantar fasciitis. He opined that the repetitive heavy physical activities of appellant's employment resulted in increased stresses through appellant's back and lower extremities which contributed to his arthritic condition with respect to his lumbosacral spine and hips. Dr. Morley noted that, while there was no history of traumatic incident involving appellant's back or lower extremities, it was his opinion that the most likely cause of his arthritic/inflammatory condition was degenerative and causally related to appellant's arduous physical duties as a letter carrier, which he described. He noted that there was no question that the demanding physical activities of appellant's job as a letter carrier affected his degenerative joint disease and permanently and irrevocably hastened and accelerated the existing arthritis in a material and substantial fashion. Accordingly, Dr. Morley opined that there was a direct causal relationship between appellant's laborious work and the current state of his back and lower extremities. He also opined that this

⁴ Although appellant's claim form indicates that he suffered from plantar fasciitis as a result of his federal duties and although Dr. Morley addresses this condition on multiple occasions, in a June 11, 2013 letter, counsel contends that appellant did not intend to claim an injury due to plantar fasciitis in this case.

acceleration was permanent and not temporary, noting that appellant's x-ray showed that he had end stage arthritis in both hips as well as advanced multiple level degenerative changes in his lumbosacral spine.

On June 11, 2013 OWCP accepted appellant's claim for aggravation of osteoarthritis, bilateral hips.

On July 18, 2013 appellant filed a claim for a schedule award (Form CA-7).

In a June 26, 2013 report, Dr. Morley indicated that appellant's duties as a letter carrier had a contributory negative affect on his degenerative arthritis by causing a further permanent acceleration of the preexisting lower extremity degenerative arthritis. He opined that the accelerated loss of the articular surface caused by the performance of laborious physical duties (such as those of letter carrier) on a joint already afflicted with arthritis was of a permanent nature, noting that as the articular surface of the joint continued to wear the joint space and this diminishment was permanent and would not reverse itself. Applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁵, Dr. Morley opined that appellant had 50 percent lower extremity impairment due to his left hip injury. He also noted that appellant had 50 percent impairment to his right lower extremity due to his hip injury and 5 percent right lower extremity impairment due to his plantar fasciitis, which resulted in 51 percent permanent impairment of the right lower extremity.

In a September 11, 2013 letter, Dr. Morley indicated again that the acceleration and hastening of the underlying arthritic process by appellant's arduous physical duties of his federal employment was permanent rather than temporary. He also indicated that there was no such thing as a temporary acceleration because it was a completed process once it occurred. Dr. Morley opined that impact loading on the weight bearing lower extremity joints in a patient suffering from hip arthritis would bring that patient to end stage sooner, thereby requiring arthroplasty sooner than one who does not engage in such loading activities.

In a June 11, 2014 report, OWCP's medical adviser indicated that the aggravation of appellant's bilateral hip symptoms by factors of his employment were of a temporary, self-limiting nature and magnitude, and did not accelerate his bilateral hip osteoarthritis process. He opined that factors of his federal employment may have caused a temporary, symptomatic aggravation of his underlying preexisting bilateral hip osteoarthritis. The medical adviser noted that there was no validation or substantiation that appellant's factors of employment accelerated his bilateral hip osteoarthritis process. He noted that it was more probable than not that had he stopped working prior to the accepted injury, his arthritic condition would have progressed in the same fashion, nature, rate, and magnitude.

On January 12, 2015 OWCP referred appellant to Dr. Christopher B. Geary, a Board-certified orthopedic surgeon, for a second opinion. It sent him an attachment containing FECA definitions of causation, including definitions for direct causation, aggravation, temporary aggravation, permanent aggravation, acceleration, and precipitation. In an April 6, 2015 opinion Dr. Geary opined that appellant's osteoarthritis of both hips was a chronic degenerative

⁵ A.M.A., *Guides* (6th ed. 2009).

condition, which was not related to appellant's employment as a federal letter carrier. He noted that there was no evidence of any discrete injury and he believed that the arthritis would have progressed in a similar fashion regardless of appellant's employment as a federal letter carrier. Dr. Geary noted that appellant's work activities would have caused temporary aggravations of his symptoms, but no permanent acceleration of his condition, and certainly there was no causation. He therefore opined that, as there was no permanent functional loss, that appellant was not entitled to a schedule award.

By letter dated June 8, 2015, OWCP found that a conflict existed between Dr. Morley and Dr. Geary with regard to the extent of appellant's accepted condition. Accordingly, it referred appellant to Dr. Murray Goodman, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP forwarded to Dr. Goodman a copy of the case file. In a June 15, 2015 report, Dr. Goodman noted that appellant was an obese man standing 75 inches tall weighing 322 pounds and diagnosed advanced osteoarthritis of both hips. He opined that appellant suffered from primary osteoarthritis of both hips that was not causally related to his occupation as a letter carrier. Dr. Goodman noted that the natural progression of osteoarthritis of the hips resulted in increasing symptoms. He also noted that temporary relief could be obtained through oral medications or intraarticular steroid injections, however, the only permanent cure was a total hip arthroplasty. Dr. Goodman opined that increased activity could temporarily aggravate appellant's symptoms and rest could help relieve the symptoms somewhat. However, in the absence of a discrete traumatic event, he further opined that increased physical activity would not cause a permanent aggravation or acceleration of this condition. Dr. Goodman concluded that the present level of symptoms was causally related to the natural progression of the disease rather than any permanent aggravation or acceleration causally related to appellant's employment.

By decision dated February 22, 2016, OWCP denied appellant's claim for a schedule award because the requirements had not been met for entitlement to a schedule award.

On November 10, 2016 appellant, through counsel, requested reconsideration. Counsel argued that new evidence, including a new medical report by Dr. Morley, required a finding that the employment-related aggravation and acceleration of appellant's hip arthritis was permanent. He contended that appellant's statement as to how his injury occurred was entitled to the weight of the evidence unless refuted by strong and persuasive evidence. Counsel also argued that it was an error of law to give any probative value to the opinion of the impartial medical examiner because his opinion contradicted applicable legal and medical standards and precedent. He argued that OWCP never provided the impartial medical examiner a definition of acceleration and permanent aggravation as contained in OWCP procedures. Counsel also contended that precedent indicated that injured federal employees with similar job duties had their claims approved, and that it would be a miscarriage of justice to not approve appellant's claim.

In a May 13, 2015 medical report, Dr. Steven J. Schroeder, a Board-certified neurosurgeon, noted that appellant was complaining of left hip pain. He diagnosed bilateral hip osteoarthritis. Dr. Schroeder determined that appellant should have a total hip replacement at some time in the future, but he should lose weight preoperatively to decrease risks.

Counsel also submitted multiple treatment notes from Dr. Young-Min Kwon, a Board-certified orthopedic surgeon. In an August 26, 2015 progress note, Dr. Kwon indicated that x-rays showed osteoarthritis of bilateral hips and right joint space narrowing and osteophyte formation. In an April 27, 2016 report, he noted that appellant had gastric sleeve surgery which resulted in weight loss of 60 pounds. Dr. Kwon noted that appellant continued to have bilateral hip pain with 9/10 intensity. On June 13, 2016 he performed a right total hip arthroplasty. In an August 3, 2016 note, Dr. Kwon noted that appellant was progressing well after his right total hip replacement, but that his left hip was increasingly becoming symptomatic. On August 26, 2016 he performed a left total hip arthroplasty.

In an October 19, 2016 report, Dr. Morley reiterated his prior opinion that appellant's progressive and end-stage bilateral hip osteoarthritis was causally related to the prolonged heavy physical demands of his occupation as a letter carrier. He indicated that a traumatic event was not required for appellant's work activities to accelerate or aggravate arthritis. Dr. Morley indicated that, although there may be a temporary worsening of the inflammation associated with the osteoarthritis, the deterioration of the hyaline cartilage was permanent and irrevocable and could not improve. He noted that, because of appellant's persistent hip osteoarthritic symptoms, he eventually underwent bilateral hip replacement.

In a November 4, 2016 statement, appellant provided a further description of his work duties.

By decision dated December 19, 2016, OWCP noted the medical opinions of record, including the opinion of Dr. Goodman, the impartial medical examiner, and determined that the evidence was not of sufficient probative value to modify the decision dated February 22, 2016.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁶ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides*, as the uniform standard applicable to all claimants.⁷ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁸

⁶ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found.

⁷ 20 C.F.R. § 10.404(a).

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

Not all medical conditions accepted by OWCP result in permanent impairment to a scheduled member.⁹ The Board notes that before applying the A.M.A., *Guides*, OWCP must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.¹⁰ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.¹¹

Section 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹² The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹³ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS

OWCP accepted that appellant sustained an aggravation of his underlying condition of bilateral osteoarthritis in his hips as a result of his federal employment duties. Appellant requested a schedule award. For entitlement to a schedule award, he has the burden of proof to establish that the condition for which compensation is sought is causally related to his employment.¹⁵

The Board finds that this case is not in posture for decision.

In support of his claim for a schedule award, appellant submitted multiple medical reports by Dr. Morley on the issue of the nature and extent of his permanent impairment. Dr. Morley opined that the acceleration of appellant's underlying arthritic process was related to appellant's arduous physical duties and resulted in a permanent impairment to his bilateral lower extremities. In a report dated June 26, 2013, after applying the A.M.A., *Guides*, he indicated that appellant

⁹ *Thomas P. Lavin*, 57 ECAB 353 (2006).

¹⁰ *Michael S. Mina*, 57 ECAB 379, 385 (2006).

¹¹ *Veronica William*, 56 ECAB 367 (2005) (a schedule award can be paid only for a condition related to an employment injury; the claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment).

¹² *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

¹³ 20 C.F.R. § 10.321.

¹⁴ *F.C.*, Docket No. 14-0560 (issued November 12, 2015).

¹⁵ *Supra* note 7 at Chapter 2.808.11 (February 2013).

had 51 percent permanent impairment to his right lower extremity and 50 percent permanent impairment to his left lower extremity.

OWCP undertook further development of appellant's schedule award claim by referring him to an OWCP medical adviser. The medical adviser disagreed with Dr. Morley's assessment of a permanent impairment due to the accepted condition. Rather, he opined that appellant's federal employment duties may have caused a temporary, symptomatic aggravation of his underlying, preexisting bilateral hip osteoarthritis, but that there was no substantiation that appellant's employment factors accelerated his bilateral hip osteoarthritis process.

OWCP then referred appellant for a second opinion with Dr. Geary, who in an April 6, 2015 opinion, provided a conclusory opinion that appellant's osteoarthritis of both hips was a chronic degenerative condition which was not related to his employment as a federal letter carrier.¹⁶ Dr. Geary noted that, although appellant's work activities would have caused a temporary aggravation of his symptoms, he believed that there was no permanent acceleration of his condition, and therefore appellant was not entitled to a schedule award. The Board finds that, while he provided an opinion on his own physical examination, he did not provide any medical rationale as to how or why appellant's specific employment duties were insufficient to cause or permanently aggravate appellant's bilateral hip osteoarthritis.¹⁷ Dr. Geary's report is therefore of limited probative value and is insufficient to create a conflict in medical opinion with Dr. Morley as to the permanency of the accepted employment condition.¹⁸

Due to a purported conflict between Drs. Morley and Geary, OWCP scheduled appellant for an examination with Dr. Goodman. As the Board has found the opinion of Dr. Geary insufficient to create a conflict, the opinion of Dr. Goodman is not that of an impartial medical specialist. However, his report may be reviewed for its own probative value on the issue of the permanency of the accepted employment condition.¹⁹

In a June 15, 2015 report, Dr. Goodman opined that appellant suffered from primary osteoarthritis of both hips that was not causally related to his occupation as a letter carrier. He opined that increased activity could temporarily aggravate appellant's symptoms, but that in the absence of a traumatic event, physical activity would not cause a permanent aggravation or acceleration of his condition. However, Dr. Goodman did not provide any medical rationale or support for his opinion that a traumatic event, as opposed to cumulative employment duties, is necessary to aggravate or accelerate hip osteoarthritis. He concluded that appellant's present level of symptoms was causally related to the natural progression of the disease (osteoarthritis)

¹⁶ *J.D.*, Docket No. 14-2016 (issued February 27, 2015) (a mere conclusory opinion provided by a physician, without the necessary rationale explaining how and why the work factors were insufficient to result in diagnosed medical conditions, is insufficient to be granted the weight of the evidence).

¹⁷ *R.M.*, Docket No. 16-0147 (issued June 17, 2016).

¹⁸ *C.H.*, Docket No. 16-1806 (issued March 9, 2017).

¹⁹ *D.M.*, Docket No. 07-1050 (issued September 24, 2007).

rather than any permanent aggravation or acceleration causally related to his employment. This conclusion is found to be conclusory in nature and thus of limited probative value.²⁰

Appellant submitted additional medical reports and treatment notes in support of his claim. These medical records were from Drs. Schroeder and Kwon, but they have limited probative value as they do not provide any opinion as to the cause of appellant's hip conditions.²¹ In response to the opinion of Dr. Goodman, appellant also submitted an opinion of Dr. Morley, contained in an October 19, 2016 report, that the bilateral hip osteoarthritis suffered by appellant was causally related to the prolonged heavy physical demands of his occupation as a letter carrier. Dr. Morley contradicted Dr. Goodman's assertion that a traumatic event was required to accelerate or aggravate arthritis, noting that demands of the postal carrier position over many years were sufficient for a progressive onset and worsening of his medical conditions, including hip osteoarthritis. He indicated that, although there may be a temporary worsening of the inflammation associated with the osteoarthritis, the deterioration of the hyaline cartilage was permanent and irrevocable.

After consideration of the medical evidence of record, the Board finds that, while Drs. Geary and Goodman opined that appellant's bilateral hip osteoarthritis was not a permanent condition, their opinions were merely conclusory as they did not provide medical rationale or other support for a finding of a lack of causation, aggravation, or acceleration resulting in a permanent impairment. Furthermore, Dr. Goodman opined that because appellant had not sustained a prior traumatic work injury that his arthritic condition could not have been aggravated due to his employment duties. The Board finds that Dr. Goodman did not specifically address how or why the accepted duties, activities, and responsibilities of appellant's federal employment, as set forth in the statement of accepted facts dated April 2, 2014, were insufficient to result in a permanent aggravation of his bilateral hip osteoarthritis, nor did he provide a well-reasoned explanation as to how a progressed arthritic condition would be temporary in nature or return to a baseline condition once aggravated.

It is well established that, proceedings under FECA are not adversarial in nature and that while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence in order to see that justice is done.²² Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.²³ After undertaking development by scheduling medical examinations with Drs. Geary and Goodman on the issue of the permanency of the accepted condition, OWCP was responsible for obtaining rationalized medical opinion evidence necessary to resolve the issue. As neither selected physician has provided such a reasoned opinion, either Dr. Geary or Dr. Goodman should be requested to provide probative medical rationale in support of his medical opinion. If neither physician is

²⁰ *Supra* note 17.

²¹ *J.G.*, Docket No. 15-1468 (issued October 7, 2015).

²² *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

²³ *See B.C.*, Docket No. 15-1853 (issued January 19, 2016).

able or willing to do so, a new second opinion examination should be scheduled in accordance with OWCP procedures.²⁴

Following this and any necessary further development on this issue, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 19, 2016 is set aside and the case is remanded for further development consistent with this opinion of the Board.

Issued: January 18, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁴ OWCP's procedures provide that, if a second opinion specialist submits an opinion which is equivocal, lacks rationale, or fails to address the specified medical issues, the claims examiner should seek clarification or further rationale from that physician. When OWCP undertakes to develop the evidence by referring the case to an Office-selected physician, it has an obligation to seek clarification from its physician upon receiving a report that did not adequately address the issues that OWCP sought to develop. As such, the claims examiner should seek clarification from the referral physician and request a supplemental report to clarify specifically-noted discrepancies or inadequacies in the initial second opinion report. Only if the second opinion physician does not respond, or does not provide a sufficient response after being asked, should the claims examiner request scheduling with another physician. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(j) (September 2010).